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Issue Date: 14 June 2005

CASE NO.: 2003-LHC-1595

OWCP NO.: 06-188105

IN THE MATTER OF

JAMES E. WRIGHT,
Claimant

v.

INFINITY SERVICES,
Employer

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier

and

KNIGHT'S MARINE & INDUSTRIAL SERVICE, INC.,
Employer

APPEARANCES:

Robert E. O'Dell, Esq.
On behalf of Claimant

Benjamin U. Bowden, Esq.
On behalf of Employer Infinity Services and Carrier

Gina B. Tompkins, Esq.
On behalf of Employer Knight's Marine

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by James E. Wright (Claimant) against Infinity Services (Employer), Liberty Mutual Insurance Company (Carrier), and Knight's Marine & Industrial Service, Inc. (Knight's Marine). The formal hearing was conducted in Gulfport, Mississippi on January 10, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-35, and Employer/Carrier's Exhibits 1-9, and Employer Knight's Marine Exhibit 1. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of injury/accident was November 16, 2001;
2. The injury was in the course and scope of employment as to Infinity Services;
3. An employer/employee relationship existed at the time of the accident as to Infinity Services;
4. Employer Infinity Services was advised of the injury on November 16, 2001;
5. Notices of Controversion were filed on October 16, 2002 by Alabama Shipyard/Atlantic Marine, May 13, 2003 by Knight's Marine, and June 24, 2003 by Infinity Services;
6. An informal conference was held on January 17, 2003;
7. Average weekly wage at the time of injury was $631.24;
8. Nature and extent of disability
    (a) Temporary total disability is disputed;

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through May 23, 2005.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, p.__"; Employer's Exhibit- "EX __, p.__"; Claimant's Exhibit- "CX __, p.__", and Knight's Marine Exhibit "KMX __, p. __."

(b) Benefits were paid by Knight's Marine from February 27, 2003 to February 20, 2004 at the rate of $315.67 per week. The total paid by Knight's Marine was $16,388.32. At some point thereafter, benefits payments began from Infinity Services at the rate of $315.67 per week;
(c) Medical benefits have been paid: Infinity Services has accepted responsibility for Section 7 medicals;

9. Permanent disability: Claimant has not reached MMI as to his shoulder. Ten percent as to Claimant's back; and
10. Date of maximum medical improvement is July 1, 2004 as to Claimant's back. He has not reached MMI as to his shoulder.

Issues

The unresolved issues in this proceeding are:

1. Date of MMI for Claimant's shoulder injury;
2. Past due TTD, interest and penalties;
3. Attorneys' fees, including lien of prior counsel;
4. As to Knight's Marine and Industrial Services, Inc., whether Knight's Marine is entitled to reimbursement for indemnity and/or medical benefits paid to and on behalf of Claimant from Infinity Services.

Statement of the Evidence

Testimony of James E. Wright

Claimant testified that on November 16, 2001, he was working for Infinity Services at Alabama Shipyard when he sustained an injury to his shoulder. Claimant held a sixteen foot long pipe in the top section of a tugboat, and his welder was supposed to be welding the pipe but took too long to tack it up; the pipe slipped, fell approximately one foot, and came down across Claimant's shoulder. Tr. 21.

Immediately following the injury, Claimant informed his "lead man" what had occurred. Two days later, he went to the emergency room at Singing River Hospital. Claimant continued to work for Employer until he was laid off on January 14, 2002. Claimant said he came to work on that day and was getting his tools out when the lead man sent Claimant to the office where he was given a pink slip. He was not given a reason for the layoff, and no one else was laid off.

Claimant believed Employer had plenty of work because it had a new five-year contract. Tr. 22.

Following his layoff, Claimant looked for work. He was not able to obtain other employment because Dr. McCloskey said he had a problem with his back and should not perform lifting. Claimant said a year passed from his injury until the time he received treatment. Dr. McCloskey has prescribed Lortab to treat Claimant's back pain, which Claimant takes every twelve hours. Claimant said his pain progressed, and around July 2002 he could not walk from his apartment to his mailbox without experiencing pain in his back and right leg. Tr. 27.

Claimant said Dr. McCloskey told him that surgery would render his condition worse than it is presently. Claimant has received epidural injections. The pain in Claimant's leg gradually improved since mid-2002. He does not know what caused his leg to improve.

An operation was performed on Claimant's rotator cuff by Dr. Wiggins in September 2004, to "close up a hole the size of a silver dollar," according to Claimant. At his most recent visit, Dr. Wiggins permitted Claimant to try and lift up to thirty pounds, though Claimant states he had no range of motion at the time of the hearing. Claimant said that he was uncertain what kind of employment he was capable of performing because he had not had the opportunity to seek out employment. Tr. 31. Claimant clarified that when he continued working for Employer following his injury, he worked in pain. He said by the afternoon he would need to sit down, which he was not allowed to do. Tr. 31. He recalled that Employer complained about his productivity and his work. Claimant did not believe he was capable of performing his usual employment of pipefitting.

Claimant has work experience as an automotive mechanic, and had some years of trade school in that regard. Since coming to the Gulf Coast in 1997, Claimant performed mostly construction and pipefitting. He worked as a "pickler" which involves putting pipes in acid to clean them and then putting them in tanks to be galvanized. Tr. 33. He has also performed some automotive jobs on the side.

Claimant testified that he received physical therapy from Ruth Bosarge for his back until the time of his shoulder operation on September 22, 2004, when she discontinued treatment. Claimant recalled seeing Ms. Bosarge three or four times. After his operation, he began physical therapy for his shoulder once or twice per week, but said that Ms. Bosarge discontinued her treatment until Claimant received an award. Claimant stopped attending physical therapy in December because he

did not have transportation and could not walk in the rain or cold to the appointments. He believed that physical therapy increased his range of motion in his shoulder. Ms. Bosarge gave Claimant some home exercises which he continued to perform three times per day. Tr. 36. If physical therapy is authorized, Claimant would return for appointments. He can walk to the appointments, especially since he has moved to a closer location.

On cross-examination, Claimant agreed that at a certain point he stopped making physical therapy appointments with Ms. Bosarge for approximately one month. Tr. 38. He disagreed that he was noncompliant with physical therapy for his back, explaining that Ms. Bosarge stopped treating his back until his shoulder healed from his operation. Claimant testified that he intends to obtain any type of employment he can. He believes that his shoulder has been worse since Dr. Wiggins performed surgery. Tr. 40. Physical therapy made his shoulder better, but he could not continue sessions because he lacked transportation.

Claimant explained that he believed he was hired by Knight's Marine and he was never told that he was not an employee of Knight's Marine. He agreed that he testified that Mark Dennis was his supervisor, and Mr. Dennis worked for Atlantic Marine. Tr. 41. Claimant received his paychecks from either a woman whose name he could not recall, or Rick Myers, who Claimant understood to be an employee of Knight's Marine. Claimant did not know who Infinity Services was, and therefore when he initiated his claim, it "made sense" to identify Knight's Marine as his employer, since he believed himself to be Knight's Marine's employee.

Claimant did not recall a meeting wherein he was told that Infinity Services was taking over his employment. Tr. 43. He recalled his deposition testimony wherein he acknowledged receiving checks from Infinity Services. Claimant also recalled that in his deposition, he stated that he thought that "they were changing to Infinity Services in maybe October or November of 2001." Tr. 43. Claimant explained that the employees were told that they would receive their checks from Infinity Services so they could receive per diem pay. Tr. 44. He agreed that after October or November 2001, he received his paychecks from Infinity Services. He said that Rick Myers hired Claimant for Knight's Marine, but Claimant later discovered that Mr. Myers was the head of Infinity Services. Tr. 45.

When Claimant was injured, he reported his injury to Mr. Myers. Claimant testified that he still did not know whether Infinity Services was his employer. He clarified that when he tried to return to employment at Knight's Marine, he went to

Mr. Myers, because he thought Knight's Marine and Infinity Services were the same company. Tr. 46.

Medical Evidence

Deposition and Records of Chris E. Wiggins, M.D.

Dr. Wiggins is a board-certified orthopedic surgeon whose records are located at Claimant's Exhibit 14 and Employer's Exhibit 3; he was deposed on February 3, 2005 and his deposition is found at Employer's Exhibit 7. Dr. Wiggins initially saw Claimant on March 13, 2002, where Claimant reported he had been injured at work four months previously. He had been seen by safety personnel and at an unknown emergency room, and had not seen any physicians until the appointment with Dr. Wiggins.

Upon physical examination, Dr. Wiggins noted tenderness, pain in Claimant's shoulder on rotation, and pain down the right leg from the groin to the mid-right femur region. X-rays did not reveal any broken bones. Dr. Wiggins concluded that Claimant had a shoulder contusion, possibly a rotator cuff tendon problem or bursitis, and a hip contusion. EX 7, p. 5. Dr. Wiggins suggested conservative measures, but cautioned that if Claimant did not improve, an MRI of the right shoulder would need to be performed, as well as a bone scan. Dr. Wiggins referred Claimant for physical therapy and prescribed Equagesic, a combination pain medication and muscle relaxant. He noted that Claimant was out of work at that time, but opined that Claimant could probably perform light duty work if it was available.

Claimant returned on March 27, 2002, when Dr. Wiggins opined that Claimant's pain was not really in his hip and thigh area; rather, it was in Claimant's back. EX 7, p. 6. An x-ray of Claimant's lower back was performed which revealed spondylolisthesis at L5-S1, in other words, a slipped vertebra. Dr. Wiggins explained that this condition can be considered a birth defect, but it can be aggravated by trauma and likely was in Claimant's case. Dr. Wiggins felt that Claimant should be evaluated by a neurosurgeon, and referred Claimant to Dr. McCloskey. Dr. Wiggins said that Claimant's shoulder was bothering him less at that time, so he told Claimant if it began to bother him again to return to the office. EX 7, p. 7.

Dr. Wiggins did not see Claimant again for roughly two years, until May 24, 2004, when Claimant returned because his right shoulder was bothering him.[3] Dr. Wiggins examined Claimant and noted tenderness in the shoulder area. Dr. Wiggins was not aware of any complaints Claimant had regarding his left shoulder, and testified that he deferred to Dr. McCloskey regarding Claimant's back problems. EX 7, p. 9.

Dr. Wiggins testified that he was not aware of any intervening circumstances which occurred between the last time he saw Claimant in 2002 and when he reappeared with shoulder complaints in 2004. He said it is quite common for an individual with a torn rotator cuff to have symptoms which wax and wane. EX 7, p. 10. Further, he said, Claimant did report an injury to his shoulder at the initial appointment in March 2002. Therefore, it was Dr. Wiggins' opinion that Claimant's right rotator cuff was torn by the accident in which he was involved in November 2001. EX 7, p. 11.

Dr. Wiggins ordered an MRI which showed a rotator cuff tear. Dr. Wiggins read the MRI and also had the scan interpreted by a radiologist. Dr. Wiggins recommended surgical intervention to correct the problem, and surgery was performed on September 23, 2004. He said the procedure was a standard rotator cuff repair, but Claimant had a "very large torn rotator cuff." EX 7, p. 12.

Dr. Wiggins testified that the surgery went well. Following the operation, Claimant was kept in a sling for approximately three to four weeks and was then referred to physical therapy with Ruth Bosarge, to commence around October 19, 2004. On January 18, 2005, Dr. Wiggins authorized another six weeks of physical therapy. EX 7, p. 12. Dr. Wiggins stated he never received any indication that Claimant was not compliant with physical therapy; rather, he understood Claimant to be fully compliant. EX 7, p. 13. He said that if Ms. Bosarge testified that Claimant was not compliant, it would not affect his opinions regarding Claimant's prognosis because he was very pleased with the progress on Claimant's shoulder. Dr. Wiggins would not prescribe further physical therapy because he doubted it would alter Claimant's outcome, since Claimant had done "quite well." EX 7, p. 14.

Dr. Wiggins testified that he could assign February 14, 2005 as maximum medical improvement date regarding Claimant's shoulder, and would assign a

[3] Dr. Wiggins testified that the notation on the record of May 24, 2004 stating that Claimant was evaluated for a new complaint should be disregarded, as it was entered by a nurse on a computer program. EX 7, p. 7.

permanent disability rating of twenty-five percent to the upper right extremity. EX 7, p. 15. Dr. Wiggins said that a permanent restriction to the right upper extremity was no persistent over-the-shoulder work, for example, continuous wall painting or hammering. He said Claimant could occasionally work above shoulder level. EX 7, p. 16.

Dr. Wiggins clarified that a rating to the upper extremity is the same as a rating to the arm. EX 7, p. 18. He said he had no plans to order a Functional Capacity Evaluation (FCE); though he would do so if the parties requested it, he did not view an FCE as medically essential EX 7, p. 23. He added a restriction of a thirty-pound limit on Claimant carrying anything over his shoulder. EX 7, p. 19.

Deposition and Records of John McCloskey, M.D.

Claimant's Exhibit 15 and Employer's Exhibit 2 contain Dr. McCloskey's records. Dr. McCloskey was deposed twice in this case; the first deposition was taken May 7, 2004 and is located at Claimant's Exhibit 16; the second was taken April 8, 2005 and is found at Employer's Exhibit 6. Dr. McCloskey is a board-certified neurosurgeon who initially saw Claimant on April 27, 2002 for injuries from a work-related accident, on referral from Dr. Wiggins. CX 16, p. 6.[4]

Upon physical examination, Dr. McCloskey noted that Claimant walked with a limp, had a positive straight leg raising test on the right, complained of back, right leg and right shoulder pain, and had some stiffness in his right shoulder. Claimant was referred to Dr. McCloskey for treatment of his back problems. There were no neurological findings on exam. Claimant had an MRI scan on May 14, 2002 which showed spondylolisthesis, a degenerated disc at L4 and L5 on the right, and foraminal stenosis particularly at L5 on the right. Dr. McCloskey said that the L5-S1 slip matched with Claimant's complaint of leg pain. CX 16, p. 8. Dr. McCloskey referred Claimant to Ruth Bosarge for a physical therapy evaluation. She opined that Claimant had a disc problem at L5-S1 and would benefit from an epidural and physical therapy. In a letter to Claimant dated May 19, 2002, Dr. McCloskey stated that surgery was not the best way to treat Claimant.

Dr. McCloskey said that after he referred Claimant to Ms. Bosarge, he did not see Claimant again until May 15, 2003, when Claimant returned because his benefits had been reinstated. At that visit, Claimant's main complaint was his

[4] References to CX 16 are made to the page numbers contained in the condensed deposition transcript rather than the Bates Stamp numbers at the bottom of the pages.

shoulder, but he also had some leg and hip complaints. CX 16, p. 10. Dr. McCloskey opined that symptomatically, Claimant was better than he had been at the previous visit. Regarding Claimant's shoulder, he said there was marked limitation of Claimant's right shoulder motion and a point of tenderness, which Dr. McCloskey described as an orthopedic problem. He wanted Claimant to return to Dr. Wiggins because Claimant was "clearly worse" regarding his shoulder than he had been at the previous visit.

While Dr. McCloskey said he wanted Claimant to return to Dr. Wiggins and Ms. Bosarge, he did not know if Claimant did so, though he did have a note indicating that Claimant never saw Ms. Bosarge. Dr. McCloskey prescribed pain medication for Claimant from May 15, 2003 until April 28, 2004, in the form of 30 Lortab per month. Dr. McCloskey's records contain a note to his office personnel dated April 14, 2004 stating that he needed to be in contact with Claimant. Dr. McCloskey spoke with Claimant on April 28, 2004 where he learned that Claimant was no longer receiving compensation, was not working, did not have insurance and could not afford pain management. CX 16, p. 13.

Dr. McCloskey said he would defer to Dr. Wiggins regarding Claimant's shoulder problems. Dr. McCloskey opined that everything he saw on Claimant's MRI scan, including the stenosis, degeneration, and slipped disc, preexisted Claimant's November 2001 work injury; however, he concluded that the accident was an aggravation of Claimant's preexisting asymptomatic condition. CX 16, p. 15. He said that symptoms with these conditions can wax and wane, and he would need to obtain information from Claimant regarding the span of time he was not being treated. CX 16, p. 17.

Dr. McCloskey saw Claimant again on July 1, 2004, where Claimant reported he was still struggling with back and right leg pain, though it was not as bad as it had previously been. EX 6, p. 4. Surgery had been proposed for his shoulder by Dr. Wiggins. Claimant had a degenerative L5 disc with spondylosis and spondylolistesis which Dr. McCloskey believed to be the source of the leg and back pain. Claimant told Dr. McCloskey he was not interested in having back surgery performed. He had no neurological deficits, but did have limitation and motion tenderness in his right shoulder.

Dr. McCloskey's impression was that Claimant had a post-traumatic low back syndrome with right leg and back pain, suspected symptomatic degeneration at L5 with spondylosis and spondylolisthesis, and a post-traumatic right shoulder problem. EX 6, p. 5. Dr. McCloskey said from his standpoint, Claimant had

reached maximum medical improvement, with a ten percent permanent partial disability rating. He referred Claimant for a mechanical physical therapy evaluation and possibly an epidural or facet injection.

In a questionnaire dated June 28, 2004, Dr. McCloskey assigned Claimant's work restrictions as light duty work. On July 21, 2004, he specifically indicated that Claimant had a thirty pound lifting restriction and light work in general. EX 6, p. 6. Dr. McCloskey said he did not specifically state the various possibilities of what Claimant could or could not do under the guise of light work, but said in general, Claimant is capable of light work based on the objective findings. EX 6, p. 7.

Dr. McCloskey did not see Claimant after July 1, 2004. He received reports from Dr. Merlos who performed at least one epidural injection. Dr. McCloskey opined that Claimant would need pain management, specifically in the form of medication, but did not anticipate referring Claimant to a pain management physician. EX 6, pp. 8-9. All Dr. McCloskey anticipated was continuing to prescribe Lortab for Claimant. Dr. McCloskey said Claimant may need periodic reevaluation of his back and physical therapy from time to time, in addition to medication, but he did not anticipate surgery or performing any other diagnostic tests. EX 6, p. 9.

Dr. McCloskey did not know whether Claimant had been compliant with physical therapy, but said he did not hear anything to the effect that Claimant was not compliant. Dr. McCloskey acknowledged that he sent Claimant a letter dated July 27, 2004, which stated Dr. McCloskey felt that Claimant was limited to sedentary light-type work. He clarified that the "sedentary light" he referred to meant lifting up to thirty pounds. EX 6, p. 10. Dr. McCloskey stated that Claimant could occasionally lift up to thirty pounds. Dr. McCloskey opined that the treatment he provided Claimant was causally related to his injury of November 16, 2001 as relayed to Dr. McCloskey, of a pipe falling on Claimant's shoulder. EX 6, p. 11.

Records and Deposition of Ruth Bosarge, P.T., C.M.D.T.

Ms. Bosarge is a physical therapist who initially saw Claimant on May 31, 2002, on referral from Dr. McCloskey. Her records are found at Claimant's Exhibit 35 and Employer's Exhibit 4; her deposition comprises Employer's Exhibit 8.

Ms. Bosarge conducted a physical therapy evaluation of Claimant on May 31, 2002, where Claimant's complaints included pain in his right shoulder, right side of his low back, and right leg, and numbness and tingling in his right leg extending to his foot. Claimant's walking tolerance was limited to less than thirty yards before he had to stop due to pain, and he was only able to sleep on his side. Claimant reported that the right sided low back and leg pain were much worse than his right shoulder and upper extremity symptoms. CX 35, p. 4.

Ms. Bosarge noted significant muscle spasm ranging from L3 through L5, worse on the right. Claimant exhibited a seventy-five percent loss of lumbar flexion, a seventy-five percent loss of lumbar side gliding right, a twenty-five percent loss of lumbar extension, and a twenty-five percent loss of lumbar gliding left. CX 35, p. 4.

Ms. Bosarge's assessment was that Claimant tested positive for a symptomatic right posterior lateral disc derangement, most likely at the L5-S1 level. She noted that Claimant seemed to be too symptomatic to tolerate mechanical treatment to decrease the derangement at that time, but opined that he may benefit from a transforaminal epidural injection at L5-S1 and then a subsequent referral to physical therapy to attempt to reduce the derangement. Ms. Bosarge stated that Claimant also had a mild strain of the right acromioclavicular and sternoclavicular joints, which she opined would likely respond favorably to physical therapy treatment including taping and modalities and tissue work to the joints. Ms. Bosarge sent her evaluation to Dr. McCloskey and delayed formulating a treatment plan pending further orders. CX 35, p. 5. Ms. Bosarge testified that Dr. McCloskey attempted to refer Claimant back to her for physical therapy, but Carrier denied the claim. EX 8, p. 12.

Ms. Bosarge next saw Claimant on July 23, 2004, where Claimant reported improvement in his lower extremity pain but his low back pain had become more debilitating. He complained of low back pain, neck and shoulder pain, numbness and tingling in both legs upon lying flat, increased neck pain upon sitting, and trouble sleeping because of pain. CX 35, p. 12.

Ms. Bosarge's examination revealed a fifty percent loss of cervical flexion, normal cervical extension, and normal cervical rotation right and left, and tenderness. His lumbar spine exam revealed a seventy-five percent loss of lumbar flexion, a twenty-five percent loss of lumbar extension, and a twenty-five percent loss of lumbar side gliding left and right.

Ms. Bosarge's assessment was that Claimant tested positive for discogenic pain at L4-5 and L5-S1. He had not had any epidural injections, which Ms. Bosarge thought would be helpful. She opined that he needed to begin wearing his lumbar corset again, and decided to initiate physical therapy to decrease the muscle spasm in the lumbar spine. She opined Claimant may have benefited from a TENS unit. Ms. Bosarge noted that Claimant's shoulder was much worse than when she last saw him. She believed that Claimant's neck problems were a result of the problems he had with his shoulder, and thought that Claimant's neck pain would improve after his right shoulder was repaired. Ms. Bosarge's plan was to see Claimant once per week for eight weeks and to teach him home exercises. CX 35, p. 13.

Claimant returned for treatment of his lumbar conditions on August 13, 2004. Ms. Bosarge testified that she was "biding time" treating his neck and back until he could have surgery on his shoulder. EX 8, p. 22. Ms. Bosarge said Claimant "dropped in" to see her on September 22, 2004. She explained that she did not believe Claimant had a telephone or transportation, so sometimes he would just come into the office. Claimant told Ms. Bosarge that he was scheduled for shoulder surgery the following day, that he had received an epidural injection two weeks before, and was scheduled for two further injections. EX 8, p. 23.

Following his shoulder surgery, Claimant was referred back to Ms. Bosarge by Dr. Wiggins, who noted that Claimant was developing an infection in his shoulder and wanted Ms. Bosarge to "keep an eye on it," mostly for bandage changes. EX 8, p. 24. For approximately two weeks, Ms. Bosarge changed the bandage and irrigated the wound; the only exercise Dr. Wiggins wanted Claimant to perform were pendulum exercises, wherein Claimant "just let his arm hang down." EX 8, p. 25. Ms. Bosarge said that Claimant's wound healed nicely and his infection cleared up, and on November 1, 2004, she was able to begin Phase One of the "Neer Protocol," which is the post-operative protocol for rotator cuff repair. Ms. Bosarge said that Claimant made some gains in his range of motion.

Ms. Bosarge received an order from Dr. Wiggins in response to her progress note, instructing her to work Claimant "hard" and add active resistance with a twenty-five pound weight-lifting limit. Ms. Bosarge believed that Claimant attended one more session, where he was started on the "shoulder sled," overhead activity with a small ball, and doing resistive external rotation exercises. Ms. Bosarge sent Claimant home with home exercises and that was the last time she saw him; he did not complete any further physical therapy visits. EX 8, p. 26. Ms. Bosarge sent Dr. Wiggins a progress note inquiring about Claimant's continuing

need for physical therapy, and Dr. Wiggins sent one note indicating he wanted Claimant to return for four weeks, and another indicated three times per week for three weeks. EX 8, pp. 26-27.

Ms. Bosarge did not know why Claimant did not return for physical therapy. Immediately following his rotator cuff repair surgery, Claimant was approved for twelve visits, of which he attended five. She was not certain whether further physical therapy would have improved Claimant's shoulder, but stated that his shoulder was "pretty good" the last time she saw him. EX 8, p. 28.

Ms. Bosarge had not had contact with Dr. McCloskey or Dr. Wiggins regarding Claimant's medical status. She testified that regardless of the reason Claimant did not complete physical therapy, she would consider his failure to contact her office or complete treatment as noncompliant. EX 8, p. 29. Ms. Bosarge did not know for a fact that the reason Claimant failed to keep his appointments was due to a lack of transportation.

Ms. Bosarge stated that she found Claimant to be credible in his complaints of pain as they matched her objective determinations. EX 8, p. 32. Ms. Bosarge said that as long as Claimant has the type of discogenic problems he has, he will likely continue to have a loss of lumbar flexion and some limitation of side gliding. She explained that it was a possibility that they could resolve, but since they had not resolved in two years, the odds that an additional two years would make a difference was rather low. EX 8, p. 33.

Ms. Bosarge agreed that the purpose of physical therapy in November 2004 was right shoulder rehabilitation following Claimant's rotator cuff surgery; she was not treating Claimant's back at that time. EX 8, p. 33. She clarified that in August, 2004, Dr. McCloskey ordered eight physical therapy visits for Claimant's neck and back to "hold" Claimant until he could have shoulder surgery, and the first visit was August 13, 2004. EX 8, p. 35. Ms. Bosarge explained that Claimant was discharged for noncompliance for treatment under the original doctor's order, and that is why he was only treated for his shoulder when he returned in November. EX 8, p. 36. Ms. Bosarge said when she last saw Claimant, he said he had been performing the home exercises she gave him, and she observed results indicating he had been doing the exercises. EX 8, p. 37.

Vocational Evidence

Ty Pennington, M.Ed., C.R.C.

Mr. Pennington, a certified rehabilitation counselor, performed a vocational evaluation of Claimant on July 29, 2004, which is located at Claimant's Exhibit 13. Mr. Pennington met with Claimant on May 6, 2004 where he conducted an interview and administered two subsections of the WRAT-3 Achievement Tests to assess Claimant's reading and arithmetic skills. CX 13, p. 1.

Mr. Pennington reviewed the records of Drs. McCloskey and Wiggins, as well as the physical therapy records. He noted that Claimant completed the tenth grade and later obtained a GED in 1975 while in the military. Claimant received vocational training from Central Texas and Wayne County Community Colleges as well as Alabama Technical. Claimant received a two-year certificate in auto-electrical training and received nine months of automotive training. Claimant served in the United States Army from 1974 to 1982, where he received other training including mechanics, electronics, hydraulics, truck driving. CX 13, p. 3. Claimant scored at the high school level on the reading and arithmetic portions of the WRAT-3. Mr. Pennington noted that Claimant had work experience in the areas of automotive, construction, pipe fitter helper, and second-class fitter. CX 13, p. 4. Claimant did not possess a valid driver's license.

Mr. Pennington opined that it was difficult to assess Claimant's residual employability as he had not been released to work. However, Mr. Pennington stated that once restrictions were outlined which allowed Claimant to return to work, he felt Claimant would be an excellent candidate to return to the open labor market, for example, if Claimant was released to a light or medium position, possible positions included shipping and receiving clerk, bench work assembler, and others with a typical entry-level wage of $6.00 to $8.00 per hour. CX 13, p. 4.

Records and Deposition of Lee Ann Dorsey, M.S., NCC, CRC, MAC, SAP

Ms. Dorsey was deposed on May 16, 2005; her deposition is located at Employer's Exhibit 9. Ms. Dorsey testified that she was not the initial vocational rehabilitation counselor who worked on Claimant's case. She explained that Tom Christianson had originally worked on Claimant's case but Ms. Dorsey had taken over his cases. EX 9, p. 7. When Ms. Dorsey received Claimant's file, she reviewed his medical records and the notes Mr. Christianson made when he met with Claimant to take a vocational history. Ms. Dorsey reviewed the records of Drs. Wiggins and McCloskey, physical therapy records, records from Singing

River Hospital, Mr. Pennington's vocational report, and the depositions of Dr. Wiggins, Dr. McCloskey, and Ms. Bosarge. EX 9, p. 8.

Ms. Dorsey said that at the time she prepared her report, she had an MMI date from Dr. McCloskey of July 1, 2004, a thirty pound lifting restriction and ten percent impairment to the body as a whole. She noted that initially Dr. Wiggins indicated that Claimant could perform light work with no overhead work and no lifting over fifteen pounds, but in his deposition he testified that Claimant reached MMI regarding his shoulder on February 14, 2005 and assigned a thirty pound limit for overhead carrying. Ms. Dorsey used the restrictions and the information Mr. Christianson had gathered from Claimant regarding his work history and identified jobs which Claimant could perform in the Gulfport area within his restrictions, which were either entry-level positions or where Claimant could use his experience. EX 9, p. 10.

Ms. Dorsey said that a thirty pound lifting restriction placed Claimant in the "medium" category of work. She explained that lifting twenty pounds on an occasional basis is medium, so Claimant's ability to lift thirty pounds meant he could perform some medium jobs. She said that some jobs are technically "heavy" jobs but do not require lifting fifty pounds, so with Claimant being in the "medium" category, she could consider such jobs, like a dump truck driver or heavy equipment operator. EX 8, p. 10.

Ms. Dorsey testified that she learned that Claimant had transportation difficulties; he did not have a valid driver's license because it had been suspended. Ms. Dorsey said that there would be certain jobs Claimant would not be capable of performing without a driver's license, but as far as the lack of transportation affected Claimant getting to and from work, she noted that he had worked from the time his license was suspended until he was laid off. EX 9, p. 12.

Ms. Dorsey explained that in conducting a labor market survey, she usually pinpoints the industry she is interested in and then contacts potential employers to inquire whether they have any jobs currently available, were there any available within the last six months, and what are the requirements for the position, specifically, is a high school diploma or GED required, what type of experience does the employer desire, and what are the physical demands of the job. EX 9, p. 14.

Ms. Dorsey located fourteen potential employers and discussed her findings for each.

1) Alltel in D'Iberville, Mississippi had a customer service position which involved sales of cellular phones. The annual salary was $18,700.
2) Production Worker at American Plastics: The position paid $9.00 to $11.00 per hour for a machine operator. Very little heavy lifting was required, though some force had to be applied for machines to work, nothing would require a worker to lift over thirty pounds.
3) Beau Rivage Casino had five positions: Cage Cashier, which paid $10.00 to $11.00 hourly, Cabana Concierge, with wages of $9.75 to $10.50 per hour, Maintenance Dispatcher which paid $9.00 to $10.00 hourly, Security Officer with wages of $8.00 to $10.00 per hour, and Surveillance Operator which paid $11.00 to $13.00 per hour. If a worker had military or law enforcement experience, it would be considered transferable experience for the Security Officer and Surveillance Operator positions.
4) Copa Casino had three available positions: Cage Cashier, Valet Runner and Security. The positions paid $10.00 to $11.00, $7.00 to $9.00, and $8.00 to $11.00 per hour, respectively. Ms. Dorsey said that Claimant's military experience would be helpful for this employer.
5) Flying J Travel was hiring a Cashier for $7.50 per hour. Ms. Dorsey spoke with the manager who informed her the employer tends to promote from within for manager trainee positions, so most workers start in the Cashier position.
6) Good Year was hiring a store Manager Trainee, which paid $12.00 to $13.00 per hour. This position required a high school diploma. Ms. Dorsey said the employer said it was looking for someone who had "gone beyond high school and demonstrated some type of higher functioning." EX 9, p. 16. Ms. Dorsey opined that Claimant's mechanic experience and certificate in automotive body work would have been beneficial for him with this employer. She believed his educational background would enable him to attempt this position.
7) Meineke had a Shop Manager position which required a high school diploma and stated that military experience was beneficial, as was college. The position paid $10.00 to $13.00 per hour. Ms. Dorsey stated that Claimant had training from a technical school which is "not college, but it is education beyond high school." EX 9, p. 17.
8) Palace Casino was hiring a Security Officer which Ms. Dorsey said was like the Security Officer positions at Beau Rivage and Copa Casino, and paid $8.00 to $10.00 per hour.
9) PFG Optics was hiring an Optics Polisher, a position which started at $9.00 per hour. This position would train a worker and there was potential to advance. Ms. Dorsey believed that Claimant's experience with mechanics

and some welding would benefit him in this position because optics "tend to do well…if they've done that type of work before." EX 9, p. 18.

10) President Casino was hiring a Valet and a Front Desk Representative, both of which were entry level positions. The Valet position paid $7.00 to $9.00 per hour; the Front Desk position paid $7.00 to $8.00 per hour.
11) Radio Shack had two Trainee positions, both of which required a high school diploma, and Ms. Dorsey said that either position would consider Claimant's technical classes because they comprised formal education beyond high school. The positions paid $9.00 to $11.00 per hour.
12) Rent-A-Center had two Customer Service positions, both of which were entry-level and paid $9.50 per hour.
13) Tobacco and Beer Discount was hiring a Cashier for $7.00 to $9.00 per hour. Ms. Dorsey stated this position had advancement potential; if a worker comes in as a cashier and demonstrates competence, he can be moved into a trainee position and ultimately a manager position.
14) Treasure Bay Casino was hiring a Security Officer and a Surveillance Officer, both of which would positively consider a military background. The wages for a Security Officer were $8.00 to $10.00 per hour and the Surveillance Operator position paid $11.00 to $13.00 per hour.

Ms. Dorsey testified that all of the positions identified fit within Claimant's age, education, job history, and physical restrictions. She said all of the positions were available as of the date of the deposition, May 16, 2005. EX 9, p. 19. Ms. Dorsey opined that there are jobs available in Claimant's geographical area which he could perform, given his age, education, job history, and physical restrictions. She said that if an individual such as Claimant were diligent in efforts to seek employment within his restrictions and considering his age, education, and employment history, employment would be obtainable.

Ms. Dorsey opined that given Claimant's age, education, work history, and physical restrictions, his wage earning capacity was between $10.00 and $12.00 per hour. She explained that in the jobs she identified, the lowest salary was $7.00 and the highest $13.00, but given Claimant's experience and work history, she believed he could bypass some of the lower paying jobs. She agreed that there existed lower paying jobs, but realistically estimated Claimant capable of earning a starting salary of $10.00 per hour. EX 9, p. 21.

On cross-examination, Ms. Dorsey testified that she verified the availability of the jobs she located within seven to ten days before the deposition. EX 9, p. 22.

She stated that none of the jobs had been identified to Claimant and no contact had been made with Claimant since Mr. Christianson's initial interview.

Ms. Dorsey clarified that the Customer Service position at Alltel required a high school diploma, but did not identify any preferred "people skills." Ms. Dorsey acknowledged that for some sales and customer service positions skills in dealing with the public would be helpful; the repair and cashier positions did not demand the same sort of skills. EX 9, p. 25. Regarding the Store Manager Trainee position at Good Year, Ms. Dorsey explained that the trainee is usually trained for the store manager and shop manager positions. The shop manager oversees other employees and does service writing; the store manager does service writing and inventory, but does not perform actual mechanic work. EX 9, p. 26.

Ms. Dorsey testified that all of the potential employers she located were then accepting applications. She explained that the position at Meineke was a service writing position and would involve inspecting vehicles, but would not require any actual automotive work. She said the Optics Polisher position could be performed while either seated or standing, and did not require bending at the waist because the workbenches were at waist level. Ms. Dorsey was aware of individuals with back or shoulder problems who had been placed in that industry, because for the most part the work they perform is classified as light. EX 9, p. 28.

On redirect, Ms. Dorsey said it is not necessary for her to discuss the positions she located with Claimant in order to determine whether they are available to him considering his age, education, and work experience. She said for the most part, all of the positions she identified allowed sitting, standing and ambulating as necessary, though the security guard positions have specific rounds which must be made so they may not be as flexible as the other positions. EX 9, p. 31.

Other Evidence

Knight's Marine has submitted a summary of compensation and medical benefits it paid to or on behalf of Claimant. Knight's Marine paid compensation at the rate of $315.16 from February 27, 2003 through February 20, 2004, in the total of $16,388.32, as evidenced by the payroll records which indicate compensation wages were paid to Claimant. Knight's Marine paid $145.00 for an office consultation with Dr. McCloskey on April 27, 2002, and $85.00 for an office visit with Dr. McCloskey on May 15, 2003. KMX 1, p. 1.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

The Parties' Contentions

Claimant asserts that he is entitled to temporary total disability compensation benefits from the day after his injury until February 14, 2005, the MMI date assigned to Claimant's shoulder. He contends that he continued to be temporarily totally disabled until Employer identified suitable alternative employment, which was no earlier than May 6, 2005. Claimant argues that because Employer/Carrier paid no benefits prior to May 2004, a penalty under Section 14(e) should be assessed. Claimant states he is entitled to all reasonable and necessary medical treatment pursuant to Section 7 of the Act.

Employer/Carrier contend that Claimant's wage earning capacity was established by Ms. Dorsey after reviewing the records and depositions of Claimant's treating physicians. Employer/Carrier assert that Claimant has a wage-earning capacity of up to $13.00 per hour, and because Ms. Dorsey's testimony is uncontradicted, Claimant's current wage-earning capacity should be deemed to be $13.00 per hour or $520.00 per week.[5]

[5] The issue of reimbursement between Infinity Services and Knight's Marine is addressed at page 26, *infra*, and Claimant, in his brief, takes no position on the issue of whether Knight's Marine is due reimbursement by Infinity Services. Claimant's Brief, p. 7.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary. 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, the parties have stipulated, and I find, that Claimant suffered an injury on November 16, 2001, while in the course and scope of his employment with Infinity Services. Claimant testified that while working as a second-class pipefitter, a pipe fell across his shoulder, and he reported the incident to safety personnel. Further, Claimant's treating physicians opined that such an accident could have caused the harm Claimant suffered. Because I find Claimant has invoked the Section 20(a) presumption and Employer has not rebutted the presumption with substantial evidence to the contrary, Claimant benefits from the Section 20(a) presumption which links his harm with his employment.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In the instant case, Claimant and Employer/Carrier stipulated that Claimant reached MMI with regards to his back on July 1, 2004. At issue was whether Claimant had reached MMI regarding his shoulder, and this issue was resolved when Dr. Wiggins was deposed post-hearing. Dr. Wiggins was Claimant's treating physician for his shoulder problems and performed Claimant's rotator cuff repair surgery in September 2004. He testified that Claimant reached MMI on February 14, 2005, and I accept this date. Dr. Wiggins was pleased with the outcome of the surgery, with Claimant's performance in physical therapy, and with his progress in general. Accordingly, I accept Dr. Wiggins' uncontradicted opinion that Claimant reached MMI regarding his shoulder on February 14, 2005, with a permanent impairment rating of twenty-five percent to the upper extremity.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In this case, following his injury, Claimant continued to work for Employer until he was laid off on January 14, 2002. Thereafter, Drs. McCloskey and Wiggins alternately deemed Claimant capable of light work or kept him off work completely. By the time Dr. McCloskey determined Claimant to be at MMI for his back, released him to light work, and assigned restrictions, Claimant was again actively treating with Dr. Wiggins for his shoulder. Claimant underwent surgery in September 2004, and was deemed at MMI and released to work in February 2005 with permanent restrictions. Claimant's previous employment was classified as "heavy," and therefore would not conform to his physical restrictions. Prior to being laid off, Claimant testified he could not perform his job duties and was in pain. After being laid off and placing himself under the care of doctors, none returned Claimant to his previous usual employment. Accordingly, Claimant has established a *prima facie* case of total disability, by being unable to return to his previous employment, and the burden shifts to Employer to establish the availability of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to

secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this instance, Employer/Carrier did not demonstrate the availability of suitable alternative employment until Ms. Dorsey testified that she identified potential available positions at her deposition of May 16, 2005, of which she testified she had confirmed the availability seven to ten days before the deposition. Ms. Dorsey testified that all of the positions adhered to Claimant's physical restrictions, including a thirty-pound weight lifting limitation. Many positions required a high school diploma or GED, and those which expressed a preference for college would be satisfied with Claimant's technical training, according to Ms. Dorsey. Ms. Dorsey discussed the fact that Claimant's military background would be beneficial, as would his experience with automotive mechanics. Consequently, I find that the positions identified by Ms. Dorsey constitute suitable alternative employment, except the Valet position at President Casino because presumably this position requires the worker to drive or park cars and Claimant does not have a valid driver's license. In other words, I find that Claimant was realistically capable of competing for and performing the remaining positions, including Customer Service, Production Worker, Cage Cashier, Concierge, Maintenance Dispatcher, Security Officer, Surveillance Officer, Cashier, Manager Trainee, Shop Manager, Optics Polisher, Front Desk Representative, and Trainee positions. All of these positions conformed to Claimant's thirty-pound lifting restriction, and were appropriate for both his education level and work experience.

When suitable alternative employment is shown, the wages which the new positions would have paid are compared to the claimant's pre-injury wage in order to determine if he has sustained a loss in wage-earning capacity. *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 333 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (2d Cir. 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. Nat'l Steel & Shipbuilding*, 10 BRBS 649, 660 (1979). Hourly wages of jobs found to be suitable alternative employment may be averaged in order to calculate wage-earning capacity. *Avondale Indus. V. Pulliam*, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In this instance, the positions identified by Ms. Dorsey paid between $7.00 and $13.00 per hour, and Ms. Dorsey provided a range of possible pay for each

position. Though Claimant possesses an education and a stable work history, it does not appear that he has transferable experience for many of these positions. Ms. Dorsey did not explain the factors which would result in different rates of pay in the range, so I find that Claimant would likely enter each position at the low-end, starting salary. The low end salaries provided by Ms. Dorsey range from $7.00 to $12.00 per hour. When the starting salaries for the positions are averaged (excluding the two valet positions) the result is $9.10 per hour. Therefore, the average starting salary of the positions, which I find to realistically reflect Claimant's wage-earning capacity, is $364.00 per week.

Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, Claimant's wages are adjusted to reflect their actual value at the time of Claimant's November 2001 injury. The National Average Weekly Wage (NAWW) for November 2001 was $483.04, and the NAWW for May 2005 was $523.58. Thus, the 2005 NAWW was approximately 92% of the 2001 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $334.88 per week, and his compensation will be diminished accordingly.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

In this case, Claimant was seen by Dr. Wiggins who referred him to Dr. McCloskey for treatment of his back. Dr. McCloskey, in turn, referred Claimant to Ruth Bosarge for physical therapy. I find that the treatment provided by all of the above individuals was reasonable and necessary to address Claimant's injuries. According to Drs. McCloskey and Wiggins, Claimant has made impressive progress with his injuries after epidural injections for his back and rotator cuff

repair surgery for his shoulder. The parties stipulated that Employer assumed responsibility for Section 7 medicals, and I find Claimant is entitled to the treatment provided by Drs. McCloskey and Wiggins, and Ms. Bosarge.[6]

Reimbursement Between Knight's Marine and Employer

All parties in this case have stipulated that Employer Infinity Services was Claimant's employer at the time of his injury. However, for reasons not entirely clear in the record or at the formal hearing, Knight's Marine commenced paying Claimant compensation benefits on February 27, 2003, and continued to do so until February 20, 2004; at some point thereafter, Infinity Services began paying Claimant compensation. JX 1.

Employer/Carrier argue that Claimant's claim was initially filed against Knight's Marine, Knight's Marine believed itself to be the responsible employer but its carrier would not pay the claim, so Knight's Marine paid Claimant itself. Employer/Carrier assert they were prejudiced by the lack of notice in the instant claim, because they did not know that Claimant's injury was one sustained with Infinity Services until a year after the injury. Employer/Carrier take the position that the law allows reimbursement between employers only where one "borrows" the other's employee, and therefore, Employer/Carrier is not responsible for reimbursement to Knight's Marine.

Knight's Marine, on the other hand, contends that Employer/Carrier acknowledge that Claimant was Employer's employee at the time of his injury. Knight's Marine began payments to Claimant when it was notified of the claim, Claimant later joined the proper employer, and Employer/Carrier took over payments. Knight's Marine takes the position that Claimant worked for Employer at the time of his injury, he received his paychecks from Employer, and he reported his injury to Rick Myers of Employer on November 18, 2001. Knight's Marine demands reimbursement of the $16,388.32 it paid to Claimant.

The administrative law judge has the authority to decide all issues integral to resolving a claimant's claim for compensation under the Act. *Temporary*

[6] At the hearing, Employer alluded to the fact it would request Claimant's compensation to be diminished for the period in which it claims Claimant was noncompliant with Ms. Bosarge's physical therapy treatment. While Claimant did miss appointments, he attended his medical appointments and Drs. Wiggins and McCloskey had not indication that Claimant was not compliant with physical therapy. In fact, Dr. Wiggins was impressed with Claimant's progress, and Ms. Bosarge agreed that Claimant performed the home exercises she assigned and that his shoulder was doing well the last time she saw him. Given the above, and the fact that Claimant had transportation problems, I cannot find that he was medically noncompliant and will not reduce his compensation.

Employment Services, Inc. v. Trinity Marine Group, Inc. [Ricks], 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001); *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990). The Board has held that the administrative law judge may also adjudicate insurance disputes that are necessary to resolve claimant's claims under the Act. *See Barnes v. Alabama Dry Dock & Shipbuilding Co.*, 27 BRBS 188 (1993). The administrative law judge also has authority to resolve related reimbursement disputes. *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996).

The majority of cases relating to reimbursement between employers involve situations where one employer "borrows" the employee of another. In these cases, the courts have held that absent a valid and enforceable indemnity agreement, the borrowing employer must reimburse the lending employer for benefits paid, explaining that the claimant's employer under the Act is liable for the claimant's benefits, and where another employer has paid those benefits, it is entitled to reimbursement from the claimant's employer under the Act. *Total Marine Services*, 87 F.3d 774. The Fifth Circuit has also held, however, that contractual disputes between employers are not integral to the compensation claim and therefore not addressable by the ALJ. *Ricks*, 261 F.3d at 465.

The instant case is not one involving a borrowing employer; however, that does not settle the reimbursement issue. In *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004), the Board remanded the ALJ's decision that he lacked jurisdiction to decide the issue of reimbursement. *Id.* at 37. *Kirkpatrick* did not involve a case of a borrowing employer; rather, there was one responsible employer and two possible responsible carriers. The Board noted that the ALJ's initial inquiry was the issue of which was the responsible carrier, and that such resolution was "incomplete without addressing the reimbursement issue" raised by one of the carriers, as the resolution of liability of the carriers was considered to be "in respect of" the compensation claim. *Id.* at 36. The Board noted that there was no contract dispute for the ALJ to resolve involving some other law than the Act, and though the ALJ determined the identity of the responsible carrier, his refusal to address reimbursement effectively made the responsible carrier liable only for what it paid, rather than for the entirety of Claimant's claim. *Id.*

I find that *Kirkpatrick* is more similar to the facts of the instant case than those cases regarding borrowing employers. Here, the parties have stipulated that Infinity Services was Claimant's employer at the time of his injury. As a result, Employer/Carrier is responsible for Claimant's benefits. Employer/Carrier asserts

that it was prejudiced by lack of notice of the claim, but stipulated that it was notified of Claimant's injury on November 16, 2001. Claimant filed his claim under the Act on April 19, 2002, less than one year after the date of injury, in compliance with Section 13 of the Act. Further, the claim designates Claimant's employer as "Infinity Services, formerly known as Knight's Marine," which while incorrect, should have indicated to Employer that it was being named in the claim. CX 33, p. 1.

For whatever reason, Knight's Marine paid Claimant's benefits when they should have been paid by Employer/Carrier, and without reimbursement, Employer/Carrier will be liable for Claimant's claim only after Knight's Marine ceased payment on February 20, 2004. Obviously, this would not complete the claim before me. Accordingly, I find that Employer, as stipulated, was Claimant's employer at the time of injury, liable for his claim, and will reimburse Knight's Marine for the compensation and medical costs it paid.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, the parties stipulated that Employer learned of Claimant's injury on November 16, 2001; Employer controverted on June 24, 2003, and did not commence payment of benefits until 2004. Therefore, as Employer did not pay compensation within 14 days of learning of injury, or timely controvert, Section 14(e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from January 15, 2002 until February 14, 2005, the date of maximum medical improvement, based on an average weekly wage of $631.24;

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability from February 15, 2005 until May 6, 2005, the date suitable alternative employment was identified, based on an average weekly wage of $631.24;

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability from May 7, 2005, and continuing, based on an average weekly wage of $631.24 and adjusted by a residual wage-earning capacity of $334.88;

(4) Employer/Carrier shall reimburse Knight's Marine the sum of $16,388.32 for compensation benefits paid to Claimant and $230.00 for medical expenses paid on behalf of Claimant;

(5) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses resulting from Claimant's injury of November 16, 2001;

(6) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(7) Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;

(8) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(9) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(10) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 14th day of June, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge